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No. 84-72

# In the Supreme Court of the United States

OCTOBER TERM, 1984

AT&T TECHNOLOGIES, INC.,
*Petitioner,*

VS.

RAYMOND C. BLIM,
MORRIS E. KINGHORN,
J. F. VUKASOVIC,
RALPH V. OLDHAM,
STANLEY L. BOARTS,
EUGENE FIRESTONE,
WALLACE S. REPETTO,
LARRY N. STEWART,
*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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## STATEMENT OF THE CASE

Respondents (hereinafter "Plaintiffs"), eight former section chiefs employed by Petitioner, AT&T Technologies, Inc., formerly Western Electric Co. (hereinafter "the Company"), add the following to the Company's statement of the case for purposes of clarification.

The judgment entered by the trial court imposed damages and attorneys fees in the amount of $901,440.78 (J.A. 268).[1] That Order was based on findings of fact and conclusions of law which additionally found that the Plaintiffs were to be restored to their rightful places with respect to

[1] As in Petitioner's Brief, "J.A." refers to the Joint Appendix filed in the Court of Appeals, and "E." refers to the Exhibit Volume of the Joint Appendix.

their pension rights (J.A. 273). The value of the restored pension benefits was $294,589.46.

The Company raised approximately 17 grounds of error on appeal. In response, the Court of Appeals commented only on the primary issues, disposing of the others *sub silentio*. The Court of Appeals affirmed the jury verdict on liability, but reversed a portion of the damages award.

## STATEMENT OF FACTS

### A. The Company's Management Structure.

The Company in Oklahoma City had a six level management structure consisting of one plant superintendent, two directors, approximately four managers, assistant managers, department chiefs, and section chiefs. Section chiefs were first line supervisors. The eight Plaintiffs, all over age 50 at the time of trial, had been long term section chiefs prior to their demotions in 1974 and 1975 during an economic downturn.

### B. The Demotions.

The Plaintiffs were foreclosed by the statute of limitations from recovering on any claim that their demotions were the result of age discrimination. However, much evidence was adduced to show age discrimination began during that period. There were 93 section chief demotions in 1974-1975. Of the 93 demotees, 22 were over age 50. Repromotions began in October 1976, and by May 1979 only one former section chief over age 50 had been repromoted. Of the 71 section chiefs under age 50 when demoted, 27 were repromoted by May 1979 (J.A. 585-586).

**C. The Claim: Failure to Repromote.**

The Plaintiffs' compensable claim was that the Company failed to repromote them due to their age beginning in October 1976 when the Company began restaffing after the economic turnaround. On October 11, 1976, 12 section chief positions were filled by promotion. Seven of these promotees had never been section chiefs and their ages were 34, 34, 30, 30, 38, 29 and 30. Five had previous section chief experience like the Plaintiffs, but four were younger than the youngest Plaintiff (J.A. 271).

On December 20, 1976, the Company filled eight more section chief positions with six new promotees, ages 34, 38, 43, 41, 29 and 36, and two repromotees, one of whom was younger than the youngest Plaintiff (J.A. 271).

**D. The Plaintiffs and their Experience with the Company.**

At the time of the trial, the Plaintiffs ranged in age from 54 years to 61 years, and their service with the Company ranged from 20 years to 39 years. They all had extensive supervisory experience with the Company prior to their demotions in 1974 and 1975. The Plaintiffs were informed that their demotions were due to economic problems the Company was experiencing, not their performance (J.A. 400-532).

The Company had attempted to induce some of the Plaintiffs to take early retirement in lieu of demotion, but they declined, due in part to the pension losses they would have suffered (J.A. 505-506). None of the Plaintiffs was informed of or offered transfers to other companies in lieu

of demotion, although the company did transfer many younger section chiefs who were thus spared from demotion (J.A. 404, 440, 462, 505-506).

**E. Overview of the Evidence.**

**1. Plaintiffs' Prima Facie Case.**

The Plaintiffs testified they continued to give their best for the Company after demotion, and were ready, willing and able to reassume their section chief positions.

Gerald Hollingsworth, the Company's own affirmative action officer at the time of the demotions, provided direct testimony that the Company worked hard to notify and protect younger section chiefs by securing for them lateral transfers to Southwestern Bell Telephone Company (SWB), a sister company (J.A. 604). SWB representatives told him, and Hollingsworth told his supervisor, Mr. Williams, a 4th level manager, that SWB wanted "young, white males", and the Company's management staff specifically recruited younger section chiefs who filled the bill (J.A. 602, 604-607). The effect was to protect the younger section chiefs from later demotions and expose Plaintiffs to the same (J.A. 611-612). Plaintiffs were never informed about these alternatives to demotion (J.A. 887-888).

A Company manager, John Genther, who offered early retirement to Plaintiff Repetto, admitted writing a memorandum memorializing a conversation with an assistant manager, M. Paul, after Genther successfully offered Paul, a man in his late 50's, early retirement in lieu of demotion. Genther told Paul that age was one of the factors in the decision (E. 8-14).

Genther also identified the Company's Conover Report, which arrived in Oklahoma City one month before the Company began refilling section chief positions (E. 16-69). This report demonstrated the Company to be very age conscious. It expressed concern that the average age of Company engineers had gone from 39 to 43 since 1970. The report stated the Company's costs increased with the age of the work force because workers were paid more as they got older. The report suggested remedies such as early retirement and an "exit from the professional universe". It also applied to engineering associates, and two Plaintiffs were eligible for promotion to engineering associate (J.A. 773-783, 838-839).

Another Company document indicating age discrimination was the Schwind Report, which collected comments of section and department chiefs on various topics. Several of these reflected age bias by the Company (J.A. 1118, 1120, 1121). The Plaintiffs themselves testified that they observed numerous younger employees, some of whom the Plaintiffs had previously supervised, being promoted to section chief positions. Most of these younger employees had no prior section chief experience.

The Plaintiffs' statistical expert, Hayward P. White, analyzed data furnished by the Company and testified that his findings revealed statistical relationships between appraisals and age, and between repromotions and age, of section chiefs which were too significant to be attributed to chance (J.A. 81-83, 697). He found that the section chiefs 49 years of age and older received three times the number of lowest performance appraisals that those under 40 received (J.A. 647). Performance appraisals were used both in the demotion and promotion process.

White found that among all employees demoted from the section chief level during the downturn in 1974 and 1975, employees under 40 received three times the repromotions those over age 49 received. According to his probability testing, this would occur only one time in one hundred by chance (J.A. 82, 83, 653, 659). His expert opinion was that younger employees, similarly situated to the Plaintiffs, received preference in terms of repromotions. Contrary to the Company's assertions, he never expressed an opinion on the ultimate legal issue of age discrimination; he merely testified that his findings indicated age and repromotion were related to a statistically significant extent (using a 95% confidence level) (J.A. 644, 657).

White's study was limited to those with former section chief experience who were not demoted for cause, but rather due to a reduction in force. This pool was factually supported by admissions that the Company did view these employees as a special group, that their repromotional history was monitored, and that they did receive an overwhelmingly disproportionate share of available section chief positions (J.A. 577-579, 1071). Edwin Schroeder, the number two man in the Company's Oklahoma City Plant, admitted that when section chief jobs began to be available again, he asked for and received a list of all demoted section chiefs so that he could keep track of them and be sure that none were overlooked in the promotion process (J.A. 987-989, 993, 995, E. 4-7). He also discussed his list with members of the Company's promotion selection committee to make sure the demotees received "due consideration". Rich Glasser, the Company controller, who had been on the promotion selection committee, was familiar with

this list of demotees because he had conversations with Schroeder about how the people on that list were faring with respect to repromotions (J.A. 905-906). Schroeder admitted that he never kept a list of any other group that may have been section chief material (J.A. 995, 923).

Company manager Genther, who participated in both the section chief demotion and promotion decisions as a member of the selection committee, testified that this list of demotees was used to determine repromotions, and that it was kept separate from the Management Potential Inventory, the Company's list of those eligible for promotion to supervisory positions (J.A. 576-580). In fact, the list was still in use when Genther left the Company in December 1978, more than two years after repromotions to section chief began, and several months after Plaintiffs filed suit (J.A. 579-580). All Plaintiffs appeared on Schroeder's demotee list, and all had previous experience as section chiefs ranging from 21 years to 5 years (J.A. 402, 425, 446, 460, 484, 502, 530).

**2. The Company's Rebuttal.**

The Company maintained other employees were better qualified for promotion to section chief than Plaintiffs, and that promotions involving women and minorities required by its affirmative action plan necessarily excluded Plaintiffs (J.A. 1149). The Company offered only unsupported testimonial assertions regarding the second reason, and immediate supervisors of the Plaintiffs were little help in establishing the first, although 15, as witnesses, tried. One even testified he hoped the Plaintiffs won their lawsuit (J.A. 863).

Marlene Cothren, a 29-year-old Company employee, analyzed the same data as Hayward White and used the same probability standards but obtained different results due to the pool of employees with whom she compared the Plaintiffs.

Cothren's pool included all employees at the Company's plant below the level of section chief, even though she admitted this had the effect of including unqualified people. Such unqualified persons included those with one day, one week, or one month of service (J.A. 1014). It included the lowest ranking hourly and salaried employees (J.A. 1088). It included those not on the Management Potential Inventory, which the Company maintained was a prerequisite to promotion to section chief (J.A. 1089). It included all salaried employees whose appraisals indicated "ready later" for promotion (J.A. 1089). Ms. Cothren's overinclusive pool did somewhat dilute the statistical showing of age discrimination, but it is important to note that even the Company's statistical evidence showed a high degree of probability that age and promotion were related.

Cothren testified that in certain age groups there was a 91% chance that age and promotion were related in 1977, a 92% chance they were related in 1976, and an 82% chance they were related in 1979, but she did not find that significant because none reached the 95% confidence level (J.A. 1092, 1097, 1099). When the probabilities reached 96.8% in 1973, she explained that other tests showed this really was not significant either (J.A. 1099-1100).

### 3. Plaintiffs' Showing of Pretext.

The Company's case consisted of an attempt to show by means of statistical evidence that age and promotions were not related, and non-statistical evidence purporting to show Plaintiffs were less qualified than others who were promoted to section chief positions.

As shown above, the Company's statistical evidence in fact tended to show age and promotion were related, but showed this relationship less clearly than the Plaintiffs' statistics because of the overinclusive comparison pool the Company's statistician used. Part of the Company's non-statistical evidence regarding qualifications was a review of Plaintiffs' performance appraisals (E. 124-126).

In addition to all of the evidence Plaintiffs adduced to show that the Company was permeated by "age consciousness", Plaintiffs' statistician White showed a statistically significant relationship (97% probability) between age and performance appraisals, such that the older an employee was, the greater the chance he would receive a low appraisal (J.A. 632, 647-648). Plaintiffs thus showed that the Company's apparently legitimate reason for failing to repromote them was in fact a pretext for age discrimination.

The Plaintiffs' own observations of age discrimination were supported by overwhelming statistical and non-statistical evidence to the extent that the jury, after hearing seven days of trial on the issue of liability, took approximately one hour and twenty minutes to find the Company had discriminated against each Plaintiff on the basis of age.

## REASONS FOR DENYING WRIT

Although it is unclear from the questions presented in the Company's Petition what its specific complaint is with respect to the trial court's "evaluation" of the Plaintiffs' statistical evidence, it appears its basis for requesting certiorari is that the court allowed that evidence to go to the jury. The Company complains of the labor pool which the plaintiffs' expert, Mr. White, used for comparison and the statistical methodology he used. From a review of the record and the Company's brief herein, it is apparent that its reasons for requesting this writ revolve around questions of evidence and factual findings which were limited to the specific circumstances of this case; and that its argument regarding a conflict of decisions is without merit, since this Court's prior decisions are controlling and not in conflict with either the trial court or the Court of Appeals' holdings in this case. Additionally, many of the evidentiary and factual errors complained of by the Company were never raised at trial and were, therefore, waived.

### I. Plaintiffs' Statistical Evidence had a Sufficient Factual Foundation.

The only factor creating any substantive difference between the respective parties' statistics in this case was a factual one — the composition of the labor pools used for comparison. The Company contends that the labor pool selected by the Plaintiffs' expert was factually inappropriate. It then leaps to the conclusion that the trial judge should have so advised the jury, or excluded the evidence altogether. However, the Company's argument fails for the dual reasons that there was abundant factual support for

the choice of pools, and because it never objected to the admission of evidence supporting Plaintiffs' pool. In fact, some of the strongest evidence supporting Plaintiffs' pool was elicted on cross-examination by the Company.

Considering the overwhelming evidence provided by other witnesses which supported the Plaintiffs' expert's choice of pools, it surely would have been error for the court to exclude his testimony. The Company was given every opportunity at trial to cross-examine Mr. White and to rebut his choice of pools with its own. This is the accepted method of testing the reliability of an opposing party's statistical evidence, or evidence of any nature, and Plaintiffs' evidence more than withstood the test. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977); *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977); *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977); *New York City Transit Authority* v. *Beazer*, 440 U.S. 568 (1979); *Payne* v. *Travenol Laboratories*, 673 F.2d 798 (5th Cir. 1982), *cert. denied*, 459 U.S. 1038 (1982); *Pegues* v. *Mississippi State Employment Service*, 699 F.2d 760 (5th Cir. 1983), *cert. denied*, 104 S.Ct. 482 (1983).

The Company's cross-examination on the pool issue strongly supported Plaintiffs' case. One portion of White's overall statistical analysis involved a comparison of the Plaintiffs with a pool of all section chiefs who had been demoted during the 1974-1975 period. The Company attempted to discredit White's choice of pools, requesting that White "get specific" as to reasons why the appropriate comparison pool was not composed of all persons working at the plant. White proceeded to perform in-court statistical calculations using the Company's own exhibits which

showed beyond doubt that it had itself treated the former section chiefs as a separate pool. White showed that so many former section chiefs had been repromoted to section chief positions, and so few of the literally thousands of other plant workers had been promoted to section chief, that the possibility of the former section chiefs *not* having been separately considered was infinitesimal (J.A. 686-690).

If White's testimony were "lacking in minimal probative value", then the Company would not have made such a concerted effort to discredit it; and having chosen to make that effort, would have succeeded. But the Company was never able to demonstrate an infirmity in the Plaintiffs' statistical proof. The Company's expert, Marlene Cothren, admitted that the employees in White's pool did "compete with an advantage", and that they did receive a much greater number of section chief positions than would be expected by chance (J.A. 1070-1071). Contrary to the very authorities cited by the Company in its Petition, her response to White's courtroom demonstration was that it would not be appropriate for a statistician to limit a pool by the relative qualifications of the individuals who were included in the pool (J.A. 1105). Courts consistently require that if a group is treated differently with respect to hiring, promotions, etc., the statistics should be categorized to reflect that differing treatment. Where statistics are not so categorized, as the Company failed to do in this case, the courts have found them to be of little probative value. *Hazelwood, supra; International Brotherhood of Teamsters, supra; Davis* v. *Califano,* 613 F.2d 957 (D.C. Cir. 1979); *EEOC* v. *American National Bank,* 652 F.2d 1176 (4th Cir. 1981), *cert. denied,* 459 U.S. 923 (1982); *Hill* v. *Western*

*Electric*, 596 F.2d 99 (4th Cir. 1979), *cert. denied*, 444 U.S. 915 (1979); *Coe* v. *Yellow Freight System*, 646 F.2d 407 (10th Cir. 1981); *Eastland* v. *TVA*, 704 F.2d 613 (11th Cir. 1983); and *Moore* v. *Hughes Helicopters, Inc.*, 708 F.2d 475 (9th Cir. 1983).

In *Hill* v. *Western Electric, supra*, a Title VII discrimination case against the same company at another location, the court found error in the district court's reliance on the company's comparison pool because it included the same unqualified people which the Company included in its pool in this case. That court stated:

> "The assumption that minimally qualified hourly rated employees were qualified for promotion to a salaried position is simply unfounded. . . . Common sense belies the assumption [that an untrained, unskilled person is immediately qualified for supervision]. . . . We do not employ babes at high salaries to lead men doing hourly rated work. . . ." *Id.* at 596 F.2d 105.

If there was any statistical evidence admitted in this case whose factual basis did not comply with the *Hazelwood* and *Teamsters* standards, it was the Company's, with its overinclusive comparison pool. The Company's real complaint is not that evidence was admitted in violation of those standards; rather, it is that the jury apparently found Mr. White to be more credible than the Company's own employee/expert. The Court of Appeals recognized this, and when the Company raised this claim below, the Court of Appeals stated:

> "The defendant also claims plaintiffs' statistical evidence lacked a sufficient factual foundation. Both the plaintiffs and defendant presented statistical data to the jury

> for consideration. We find no basis for the assertion that it was error to admit the evidence. Both parties developed a reasonable basis in the evidence for their respective statistical studies. The data and the methods were tested on cross-examination. The objections of the appellant appear to be directed in large part to the weight to be given the studies. Whether the evidence supported the plaintiffs' statistical conclusions and what weight should be accorded to those statistics are issues for the jury. *Langesen* v. *Anaconda Co.*, 510 F.2d 307, 317 (6th Cir. 1975). Therefore the trial court properly admitted the data." *Blim* v. *Western Electric Co., Inc.*, 731 F.2d 1473, 1477 (10th Cir. 1984).

*See also EEOC* v. *Radiator Specialty Company*, 610 F.2d 178 (4th Cir. 1976); *EEOC* v. *American National Bank*, *supra*; and *EEOC* v. *United Virginia Bank/Seaboard National*, 615 F.2d 147 (4th Cir. 1980).

**II. The Plaintiffs, Statistical Evidence was Properly Admitted; There was no Legal Ground to Bar its Submission to the Jury.**

Having chosen their separate pools for comparison—the Company using a pool which, by its expert's own admission, included unqualified people, while the Plaintiffs compared themselves to other former section chiefs only—the parties both proceeded to use binominal distribution tests, of the type used by this Court in *Castaneda* v. *Partida*, 430 U.S. 482, 496 n.17 (1977), to determine if there was a relationship between age and repromotion to the section chief position. It is therefore quite puzzling that the Company attacks the Plaintiffs' statistics as lacking even minimal probative value. Because the Company used essentially the same statistical methodology as did the Plaintiffs, it is

in effect attacking the probative value of its own statistics as well.

As discussed in the Statement of Facts, the results of the Company's own statistical testing showed an extremely low likelihood that the observed age distribution of promotees to section chief positions could have come about by chance. By those calculations, the probability that age and promotion were related ranged up to 96.8%. The Plaintiffs' statistics, which eliminated the extraneous variables introduced by the Company's overinclusive comparison pool, showed an even greater correlation between age and repromotion, a 99% probability that the age distribution of section chief repromotees was not due to chance.

The results of a binomial distribution test can be expressed in several ways, among them the percentage probability of chance as an explanation, and standard deviations. *Castaneda*, *supra*, at 430 U.S. 496 n.17. Both parties expressed their results in terms of probability percentages. The Company also calculated its results in terms of standard deviations. The resulting standard deviations were less than three. Ever since the standard deviation calculations were performed, the Company has tried to use this statistical artifact as substantive evidence of non-discrimination.

The jury refused to find that the Company's standard deviation figures outweighed the Plaintiffs' combined statistical and non-statistical evidence and the Company's own percentage probability calculations. The Plaintiffs had brought their statistics convincingly to life for the jury with plentiful corroborating anecdotal evidence, such as the Company's own former equal employment opportunity officer's testimony that the Company had instructed him to find

"young, white males" for demotion-avoiding transfers. *See Teamsters, supra* at 431 U.S. 339; *Norris* v. *Alabama*, 294 U.S. 587 (1935).

The Company sought to overcome the Plaintiffs' overwhelming evidentiary advantage by offering a jury instruction which stated:

> "There is a precise method of measuring the significance of . . . statistical disparities or differences. It involves calculations of 'standard deviation'.
>
> * * *
>
> If you find from the evidence that the fluctuation of numbers or percentage of promotions by age bracket is less than two or three standard deviations from what would have been predicted based on the numbers of employees eligible for promotion, you may not find from the statistical evidence that age was a determining factor in selecting persons for promotion or re-promotion, and you must return a verdict in favor of defendant and against the plaintiffs." (J.A. 66).

This instruction would first have implied to the jurors that standard deviations were somehow more precise than the other statistical evidence they had heard from both parties, which included raw percentages and raw numbers as well as the probability percentages already reviewed. Numerous decisions of this and other courts stand for the propositions that statistics "come in infinite variety", *Teamsters, supra* at 431 U.S. 340, and their probative value does not depend on whether they are couched in the form of standard deviations. *See, e.g., id.* at 431 U.S. 337-8 (raw percentages); *Castaneda, supra* at 430 U.S. 495-6 and cases cited therein (raw percentages); *Norris* v. *Alabama, supra* (raw numbers); *EEOC* v. *American National Bank, supra*

(raw percentage comparisons probative though standard deviations less than three); *EEOC* v. *Sandia Corp.*, 649 F.2d 1383 (10th Cir. 1980) (binomial distribution test results presented as probability percentages). *See also Hazelwood, supra* at 433 U.S. 311 n.17 ("These observations are not intended to suggest that precise calculations of statistical significance are necessary in employing statistical proof . . .").

A second infirmity in the Company's proposed jury instruction shows that the *Castaneda* reference to "two or three standard deviations", *Castaneda, supra* at 430 U.S. 496 n.17, was never intended as an inflexible minimum measure of significance which all statistical evidence must meet. The proposed jury instruction would have had the jury find for the Company if the "fluctuation . . . of promotions by age bracket is less than two or three standard deviations . . . ." What was the jury to do if the fluctuation fell between two and three standard deviations? Clearly if this Court had wished to set a minimum standard of statistical significance in *Castaneda*, it could and would have specified exactly what that standard was, i.e., which particular number of standard deviations to use.

The third legal error in the Company's proposed instruction is that it would have required the jury to leap from a finding that the Plaintiffs' statistical evidence was not probative (solely because it was not expressed in standard deviations) to a verdict for the Company, without pausing to consider any of the *non*-statistical evidence. The Plaintiffs were entitled to have all their evidence, statistical and non-statistical, considered by the jury. *Teamsters, supra* at 431 U.S. 339; *EEOC* v. *American National Bank, supra* at 652 F.2d 1188-1189.

A fourth reason for refusing the proposed instruction, and perhaps the most compelling, is that the Company had not provided the judge (or, as it turned out, the jury) any factual basis upon which to conclude that the Plaintiffs' statistics were not probative. The results of the Company's attempt to rebut the Plaintiffs' statistics were reviewed in the previous section of this brief. Due to the failure of that rebuttal, the trial judge had no factual basis for giving an instruction which in effect told the jury that the Company's statistical evidence was more probative than the Plaintiffs'.

The Company did object to the instruction which was given regarding statistics, but not on the basis that the Plaintiffs' statistics were not probative. The Company objected solely on the basis that it believed the instruction did not sufficiently state that statistical evidence alone may establish a defense in a discrimination case (J.A. 1157). The instruction reads in pertinent part as follows:

> "Other evidence, including statistical evidence, can establish [the elements of a *prima facie* case], as well as the ultimate issue, if the jury believes that it shows that a plaintiff was not repromoted because of his age. By the same token, the defendant is entitled to present and rely upon statistical as well as direct evidence in presenting its case." (J.A. 101).

It is evident that the jury was instructed that either the Company or the Plaintiffs could use statistical evidence to make their respective cases, and that the Company's objection went mainly to wording and emphasis. *Chicago and N.W.R. Co.* v. *Whitton*, 80 U.S. 270 (1871); *Brandt* v. *French*, 638 F.2d 209 (10th Cir. 1981).

The Company has not pressed its objection on appeal, choosing instead to take the position that statistical evidence alone cannot prove discriminatory intent. The Company's position is not only inconsistent with its stance at trial, it is incorrect as a matter of law. *See U.S. Postal Service Bd. of Governors* v. *Aikens*, 460 U.S. ____ n.3., 103 S.Ct. 1478 (1983); *Hazelwood, supra* at 433 U.S. 308-309; *Teamsters, supra* at 431 U.S. 339; *James* v. *Stockham Valves and Fittings Co.*, 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978).

Because the Plaintiffs introduced a great deal of non-statistical as well as statistical evidence in support of their claims, the issue of whether the jury was entitled to render a verdict based on statistics alone is not presented by the facts of this case. *See Hazelwood, supra* at 433 U.S. 306 n.12.

To summarize, the Company complains that it was error to admit the Plaintiffs' statistical evidence, but both parties in fact used the same statistical methodology, though the Company chose to present some of its results in the form of standard deviations. The only substantive difference between the respective parties' statistics is the difference between the comparison pools, and the Plaintiffs demonstrated the appropriateness of their comparison pool with both statistical and non-statistical evidence.

The Company has never been able to show, either factually at trial or as a matter of law on appeal, that its use of a comparison pool containing unqualified people or its couching of some of its results in the form of standard deviations renders its evidence more probative, or the Plaintiffs' evidence less so. Both the trial judge and the Court of Ap-

peals evaluated the admissibility of the Plaintiffs' statistical evidence and the Company's objections thereto. Both held that the Company's objections went to the weight, not the admissibility, of the evidence. *See* J.A. 623 and *Blim* v. *Western Electric Co., Inc., supra.* The Company's Petition presents a vague discussion of the role of judge and jury in an age discrimination suit, but gives no factual or legal basis for disturbing this evidentiary ruling, now concurred in by two lower courts. *Cf. Rogers* v. *Herman Lodge,* 458 U.S. 613, 623 (1982); *Berenyi* v. *Immigration Director,* 385 U.S. 630, 635 (1967).

### III. The Misreading of One Word in the Jury Instructions is not a Ground for Granting a Writ of Certiorari.

The Company asks this Court to grant certiorari on the basis that the trial court misread one word out of 16 pages of jury instructions. It argues, without support, that this misread word affected its substantial rights in such a way as to merit reversal.

In that instruction (J.A. 100-103), the court properly advised the jury as to Plaintiffs' burden of proof according to *Texas Department of Community Affairs* v. *Burdine,* 450 U.S. 248 (1981), but inadvertently misread one word. The written instructions provided to the jury during its deliberations and filed in the record below state:

> "It is for the *court* in this case to determine whether the defendant has stated a legitimate reason or reasons why employees other than the plaintiffs have been promoted to Section Chief as openings occur." (Emphasis added) (J.A. 102).

Two sentences later, the written instructions state:

"You are instructed that the *court* has found that these stated reasons are legitimate reasons [why employees other than the plaintiffs were promoted to section chief positions]. . . ." (Emphasis added) (J.A. 102).

In his oral charge to the jury, the judge misread as follows: "It is for the *jury* in this case to determine . . .", but he accurately read in the second subsequent sentence that "the *court* has found that these stated reasons are legitimate reasons." The Company maintains in its brief that it was prejudiced by the court's oral reading of the instruction, but it failed to include in its brief the fact that the court, in actuality, took the issue away from the jury when it instructed the jury that it had already determined that the Company's articulated reasons for not repromoting the Plaintiffs were legitimate reasons. The Company cites authority in its brief for the proposition that there can be no deference to a factual finding tainted by legal error, but fails to mention that there was no factual finding for the jury to make on this element.

The Company has not asserted that the instruction when read as a whole did not properly convey the essence of the law, nor could it honestly do so. The Court of Appeals similarly found no error as to this issue when it held that the jury was properly instructed as to the burden of proof. *Blim, supra* at 1477. The weight of authority requires that instructions always be read as a whole and not piecemeal in determining whether or not a jury was properly instructed. *Geller* v. *Markham*, 635 F.2d 1027 (2nd Cir. 1980), *cert. denied*, 451 U.S. 945 (1981); *Troutman* v. *Southern Railway Company*, 441 F.2d 586 (5th Cir. 1971), *cert. de-*

*nied*, 404 U.S. 871 (1971); *Smith* v. *Wire Rope Corporation of America*, 383 F.2d 186 (8th Cir. 1967); *Sweet Milk Company* v. *Stanfield*, 353 F.2d 811 (9th Cir. 1965).

It is fundamental that certiorari will not be granted for episodic occurrences such as this. *Rice* v. *Sioux City Memorial Cemetery, Iowa*, 349 U.S. 70 (1955).

## CONCLUSION

By reason of the foregoing, the Company's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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August 16, 1984

**CERTIFICATE OF SERVICE**

I, PHILIP F. HORNING, counsel for Respondents, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served all parties required to be served by depositing three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari in the United States Mail, first class postage prepaid, this 16th day of August, 1984, addressed to Paul M. Thompson and Christine H. Perdue, Hunton & Williams, Post Office Box 1535, 707 East Main Street, Richmond, Virginia 23212; William D. Curlee, Lytle, Soulé, Curlee, Harrington, Chandler & Van Dyke, 2210 First National Center, Oklahoma City, Oklahoma 73102; and Howard K. Phillips, Clerk, United States Court of Appeals for the Tenth Circuit, Denver, Colorado 80294.

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